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No. 14-1418

IN THE

Supreme Court of the United States

MOST REVEREND DAVID A. ZUBIK, ET AL.,
Petitioners,

v.

SYLVIA MATHEWS BURWELL, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF OF PETITIONERS

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TABLE OF CONTENTS

Page

REPLY BRIEF OF PETITIONERS 1

I. THE DECISION BELOW CONFLICTS WITH *HOBBY LOBBY* AND THIS COURT'S OTHER PRECEDENT 2

II. THE CIRCUITS ARE DIVIDED 8

III. THIS COURT'S INJUNCTIONS DO NOT SUPPORT THE GOVERNMENT'S CLAIMS 10

IV. THIS CASE PRESENTS A UNIQUE OPPORTUNITY TO RESOLVE THIS EXCEPTIONALLY IMPORTANT ISSUE 11

CONCLUSION 13

TABLE OF AUTHORITIES

Page(s)

Cases

Bowen v. Roy,
476 U.S. 693 (1986) 5

Burwell v. Hobby Lobby,
134 S.Ct. 2751 (2014) ..... *passim*

Catholic Health Care Sys. v. Burwell,
2015 WL 4665049
(2d Cir. Aug. 7, 2015) 9, 10

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,
508 U.S. 520 (1993) 7

E. Tex. Baptist Univ. v. Burwell,
793 F.3d 449 (5th Cir. 2015) 9

EWTN v. HHS,
753 F.3d 1339 (11th Cir. 2014) 9

Grace Schools v. Burwell,
2015 WL 5167841
(7th Cir. Sept. 4, 2015) 9

Hobby Lobby Stores, Inc. v. Sebelius,
723 F.3d 1114 (10th Cir. 2013) 8

Holt v. Hobbs,
135 S.Ct. 853 (2015) 7

Hosanna Tabor v. EEOC,
132 S.Ct. 694 (2012) 12

TABLE OF AUTHORITIES
(continued)

Page(s)

Korte v. Sebelius,
735 F.3d 654 (7th Cir. 2013) 8, 10

Little Sisters of the Poor v. Burwell,
2015 WL 5166807
(10th Cir. Sept. 3, 2015) 2, 9

Little Sisters of the Poor v. Burwell,
794 F.3d 1151 (10th Cir. 2015) 8, 9

Little Sisters of the Poor v. Burwell,
134 S.Ct. 1022 (2014) 10

Lyng v. Northwest Indian Cemetery Protective Association,
485 U.S. 439 (1988) 5

Mich. Catholic Conf. v. Burwell,
2015 WL 4979692
(6th Cir. Aug. 21, 2015) 9, 10

Navajo Nation v. U.S. Forest Serv.,
535 F.3d 1058 (9th Cir. 2008)
(en banc) 5, 9

Priests for Life v. HHS,
772 F.3d 229 (D.C. Cir. 2014) 8, 9, 10

Priests for Life v. U.S. Dep't of Health & Human Servs.,
No. 13-5368, 2015 U.S. App. Lexis
8326 (D.C. Cir. May 20, 2015) 9

TABLE OF AUTHORITIES
(continued)

Page(s)

Thomas v. Review Bd.,
450 U.S. 707 (1981) 3

United States v. Ballard,
322 U.S. 78 (1944) 2

United States v. Lee,
455 U.S. 252 (1982) 3

Univ. of Notre Dame v. Sebelius,
786 F.3d 606 (7th Cir. 2015) 9

Wheaton College v. Burwell,
134 S.Ct. 2806 (2014) 10

REPLY BRIEF OF PETITIONERS

The Government does not dispute that this is a religious liberty case of exceptional importance. Nor does the Government dispute that this case is unique, among all other petitions challenging the Government's Mandate and Accommodation, because it is based on a factual record fully developed at an evidentiary hearing. A Roman Catholic Cardinal, two Bishops, and leaders of Catholic organizations testified that the conduct required of them, including signing and submitting the self-certification form, violates their sincerely-held religious beliefs. Yet if they refuse to take these actions, they are subject to severe penalties. Thousands of religious organizations face the same improper choice.

The Accommodation is not a simple "opt out," as the Government contends. Petitioners' signing and submitting the required documents is an essential step, without which their TPAs have no authority nor obligation to provide the morally objectionable coverage. Instead of an opt out, the Government requires continuing actions from Petitioners, within the context of *their* health plans, that make them complicit in a moral evil with "eternal" consequences.

This Court should grant certiorari to protect Petitioners' religious liberty. The Third Circuit's decision contradicts this Court's longstanding precedent, which precludes judicial second-guessing of adherents' religious beliefs. Moreover, as eleven dissenting circuit judges have observed, the Third Circuit's decision contradicts this Court's precedent and fuels confusion among the circuits regarding the proper tests for substantial burden and strict

scrutiny under RFRA. As explained last week, the opinions upholding the Accommodation are "contrary to all precedent concerning the free exercise of religion." *Little Sisters of the Poor v. Burwell* ("*LSOP*"), 2015 WL 5166807, at *2 (10th Cir. Sept. 3, 2015) (Hartz, J., dissenting). This Court's intervention is needed to clarify these important issues.

The fully-developed record here also shows that, without any basis, the Government's Accommodation divides religious organizations into artificial groups. Some organizations are "exempt," while others that are merely "accommodated" must take actions that violate their religious beliefs or face significant fines. The Government has offered no compelling interest for distinguishing between the two, nor for pressuring the "accommodated" organizations to violate their sincerely-held beliefs, where other less restrictive means are available.

I. THE DECISION BELOW CONFLICTS WITH *HOBBY LOBBY* AND THIS COURT'S OTHER PRECEDENT

A. The Third Circuit's substantial burden decision is contrary to this Court's precedent on two specific points.

1. The Third Circuit contradicted this Court's consistent precedent, which was reaffirmed in *Hobby Lobby*, that courts cannot second-guess sincerely-held religious beliefs. In 1944, the Court held that claimants alone get to decide the substance, scope, and verity of their religious beliefs, and courts can only assess the claimant's sincerity. *United States v. Ballard*, 322 U.S. 78, 86-87 (1944). Ever since, this

principle has been reaffirmed in an unbroken chain. *E.g.*, *Burwell v. Hobby Lobby*, 134 S.Ct. 2751, 2778-79 (2014); *United States v. Lee*, 455 U.S. 252, 257 (1982); *Thomas v. Review Bd.*, 450 U.S. 707, 716 (1981) (such inherently religious judgments lie well beyond "the judicial function").

Here, there is no dispute that Petitioners sincerely believe that the actions the Government requires of them violate their religious beliefs by making them complicit in the provision of the objectionable coverage. *E.g.*, Pet.App.83a-85a. Yet, the Third Circuit held, and the Government argues, that Petitioners are not "complicit" and their "real objection" is to third-party conduct. Pet.App.36a-37a; Opp. 15-17 & n.11, 19. That is wrong and contrary to this Court's precedent.

Petitioners are constitutionally entitled to draw the line at which their conduct becomes morally and religiously impermissible. *E.g.*, *Thomas*, 450 U.S. at 714 ("[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection"); Pet. 22-23. Courts do not get to decide arbitrarily that the causal chain has been broken by independent or third-party conduct. Op. 20-22 & n.12. Indeed, this Court has held that a worker who objected to making tank turrets had a valid religious objection—even though such turrets would only potentially be used by an independent third party at some later point in an armed conflict. *Thomas*, 450 U.S. at 711; Pet. 23-25.

Contrary to the Government's arguments that Petitioners object solely to third-party conduct, Petitioners object to their *own* participation in a

religiously impermissible activity: the provision and facilitation of the objectionable coverage. Under current law, TPAs cannot provide this objectionable coverage to Petitioners' employees *unless* and *until* Petitioners sign and submit the Government's forms. Pet. 25-27; Stay App. 25. The Government stipulated that the self-certification plays such a causal role, Pet. 26 n.5 (quoting joint stipulation), and conceded it here, Opp. 22-23 & n.12, contrary to the Third Circuit's indefensible opinion. Pet.App.35a ("[T]his purported causal connection is nonexistent."). Petitioners *themselves* are compelled to act in a morally objectionable manner. As a result, the Accommodation is not an "opt out," where one objects and walks away. Rather, it requires the objector to trigger the TPA's obligation and maintain an ongoing relationship with the TPA, including providing ongoing information, that will use the objector's plan as a vehicle to provide participants with the objectionable coverage.[1]

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[1] The Government erroneously asserts that Petitioners "conceded at oral argument" that they have no objection to "notifying their TPAs" of their objections or to maintaining "their existing [TPA] arrangements." Opp. 14, 18. But, "an act that is innocent in itself" may become objectionable depending on "the circumstances." *Hobby Lobby*, 134 S.Ct. at 2778. Thus, at the argument below, Petitioners merely noted that while they have no inherent objection to taking these actions in a vacuum, they most assuredly *do* object when such actions trigger immoral conduct. As the district court observed, it is permissible to allow a neighbor "to borrow a knife to cut something on the barbecue"; but impermissible to do the same when the neighbor "requests a knife to kill someone." Pet.App.109a.

2. The Third Circuit also contradicted this Court's long-standing substantial burden precedent. This Court consistently applies a two-step test to determine a substantial burden: (1) has the Government required conduct by the believer that violates his sincerely-held religious beliefs (2) under threat of significant penalty? *E.g.*, *Hobby Lobby*, 134 S.Ct. at 2775-76. The Third Circuit added a novel third step: courts must conduct an "objective evaluation" of the level of complicity required by the regulations. Pet.App.29a-31a.

The novel third step is not found in this Court's decisions, nor is moral complicity something within a court's purview to evaluate. The Government attempts to ground this analysis in *Bowen v. Roy*, 476 U.S. 693 (1986) and *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988). Opp. 17-22. But *Bowen* and *Lyng* hold only that an individual cannot challenge the activity of a third party in which he plays *no role*. The plaintiffs in *Bowen* could not object to *the Government* using their daughter's Social Security number to administer her benefits. 476 U.S. at 699-701. The plaintiffs in *Lyng* could not prevent *the Government* from building a road on public land. 485 U.S. at 449. "In neither case" were "the affected individuals ... coerced by the Government's action into violating their religious beliefs." *Id.*; Stay App. 23-24. That is how courts consistently have applied *Bowen* and *Lyng*. *E.g.*, *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1064 (9th Cir. 2008) (en banc). Here, Petitioners are challenging regulations that compel *them* to act in violation of their sincerely held religious beliefs.

There is no justification for the Third Circuit's "objective evaluation" of Petitioners' beliefs.

B. The Government's strict scrutiny analysis, which circuit courts have adopted, further contradicts this Court's precedent. *See* Stay App. 26-35.

1. The Government's compelling interest analysis is contrary to this Court's precedent, as reaffirmed in *Hobby Lobby*. Under *Hobby Lobby*, the Government must "demonstrate that the compelling interest test is satisfied through application of the challenged law [to] the particular claimant whose sincere exercise of religion is being substantially burdened." 134 S.Ct. at 2779. Here, the Government has alleged interests in "the promotion of public health" and in "assuring that women have equal access to health care services." Pet.App.116a; Opp. 24. But *Hobby Lobby* rejected these "very broadly framed" interests, noting that RFRA "contemplates a 'more focused' inquiry." 134 S.Ct. at 2779. Those broad interests are particularly inappropriate here, because, as the district court found, the Government "failed to offer any testimony or other evidence ... to support [its] claim" that Petitioners' employees have suffered, or will suffer, "any 'negative health or other outcomes' without the enforcement of the contraceptive mandate." Pet.App.120a. The Government conceded that it had no additional evidence on these elements. *See* Pet. 16 (quoting district court).

Moreover, those interests cannot be compelling because they apply equally to the millions of women on exempt group health plans. *Hobby Lobby*, 134 S.Ct. at 2780-81. This Court's precedent establishes that such exemptions are fatal to the Government's

asserted interests. *E.g.*, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993). For example, the Government has no justification for its distinction between equally religious exempt and "accommodated" entities. Pet.App.110a-115a.[2]

2. The Government's least restrictive means arguments also are contrary to this Court's precedent, as reaffirmed in *Holt* and *Hobby Lobby*. The Government focuses on the burdens that alternatives would impose on third parties, but, at the very least, the Government must present evidence before such burdens can justify compelling Petitioners to violate their religious beliefs. *Hobby Lobby*, 134 S.Ct. at 2781 n.37 ("Nothing in the text of RFRA or its basic purposes supports giving the Government an entirely free hand to impose burdens on religious exercise so long as those burdens confer a benefit"—however minor—"on other individuals."); *see also Holt v. Hobbs*, 135 S.Ct. 853, 864 (2015).

Here, Petitioners proposed many viable alternatives that would not violate their sincerely-held religious beliefs, including options endorsed in *Hobby Lobby*.[3] Pet. 33-34; Stay App. 33-34; 134 S.Ct. at 2780-81. The Government has no evidence that those alternatives would burden anyone or be less

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[2] The Government's newly-invented interest in "filling the gaps" in contraceptive coverage, Opp. 24, was not preserved and cannot be compelling, given the many other exemptions granted by the Government, *supra* p. 6-7.

[3] Contrary to the Government's claims, Opp. 25, Petitioners have repeatedly stated that these alternatives would not "violate their beliefs." *E.g.*, Stay App. 34.

effective than the Accommodation. Yet, courts have rejected those alternatives, even after recognizing that the alternatives impose at most "minor added steps." *E.g., Priests for Life v. HHS* ("*PFL*"), 772 F.3d 229, 265 (D.C. Cir. 2014). If courts apply this test going forward, thousands of RFRA plaintiffs will be forced to violate their beliefs based on speculative burdens on third parties.

II. THE CIRCUITS ARE DIVIDED

The circuits are divided on the nature of RFRA's substantial-burden test, and on whether this regulatory scheme can survive strict scrutiny. Pet. 19-35. That seven courts have found the accommodation "consistent with RFRA," Opp. 26, 29, only emphasizes the need for review.

1. The circuits are divided over the appropriate substantial burden test under RFRA. Some circuits apply the 2-part test discussed above. *Supra* p.4. Seven circuits add other steps to the test, analyzing whether the believer is actually complicit or whether the required action (rather than the *pressure* to take that action) is substantial.

This Court has established the 2-part substantial burden test. *Supra* p. 4. The Government does not deny that circuits properly applied that test in *Korte v. Sebelius*, 735 F.3d 654 (7th Cir. 2013) and *Hobby Lobby v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013).[4] The Ninth Circuit also consistently applies that test. *Navajo Nation*, 535 F.3d at 1063. Additionally, twelve circuit judges recognize that test is proper in

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[4] The Tenth Circuit paid lip service to this test in *LSOP*, 794 F.3d 1151 (citing *Hobby Lobby*).

cases challenging the Accommodation. *Grace Schools v. Burwell*, 2015 WL 5167841, at *18-23 (7th Cir. Sept. 4, 2015) (Manion, J., dissenting); *LSOP*, 2015 WL 5166807 (Hartz, J., dissenting); *LSOP*, 794 F.3d 1151 (10th Cir. 2015) (Baldock, J., dissenting in part); *Univ. of Notre Dame v. Sebelius*, 786 F.3d 606, 628-29 (7th Cir. 2015) (Flaum, J, dissenting); *PFL*, 2015 U.S. App. LEXIS 8326, *49 (May 20, 2015) (Kavanaugh, J., dissenting); *id.* at *19-20 (Brown, J., dissenting); *EWTN v. HHS*, 756 F.3d 1339, 1345 (11th Cir. 2014) (Pryor, J., concurring).

Seven circuits—without consistency among themselves—have added additional steps to the substantial burden test. As discussed, the Third Circuit added an "objective evaluation" of the actions required by the Accommodation, determining that Petitioners are not "complicit" and their "real objections" are to third-party conduct. *Supra* p. 2-4. Six other circuits have also applied variations of that test. *Mich. Catholic Conf. v. Burwell*, 2015 WL 4979692, at *7-15 (6th Cir. Aug. 21, 2015); *Catholic Health Care Sys. v. Burwell*, 2015 WL 4665049, at *7-16 (2d Cir. Aug. 7, 2015); *LSOP*, 794 F.3d 1151; *E. Tex. Baptist Univ. v. Burwell*, 793 F.3d 449, *456-63 (5th Cir. 2015); *Notre Dame*, 786 F.3d at 615-18; *PFL*, 772 F.3d at 247-52.

Three of those circuit courts also analyzed whether the Accommodation requires "substantial" actions. These circuits held that signing and submitting a form is not a substantial action and therefore cannot be a substantial burden under RFRA. *Mich. Catholic Conf.*, 2015 WL 4979692, at *25; *Catholic Health Care Sys. v. Burwell*, 2015 WL 4665049, at *9; *PFL*, 772 F.3d at 256.

2. The circuits are split on strict scrutiny. The Seventh Circuit has found that there are viable less restrictive alternatives outside of employer-sponsored group health plans. *Korte*, 735 F.3d at 686. The D.C. Circuit rejects the exact same alternatives, because they would "make coverage no longer seamless from the beneficiaries' perspective." *PFL*, 772 F.3d at 245, 264-67. The Government does not deny these split decisions, arguing instead that these cases posed different questions. Opp. 33. But, the question is exactly the same: what alternatives can be considered and what evidence does the Government need to present to demonstrate an alternative should be rejected.

III. THIS COURT'S INJUNCTIONS DO NOT SUPPORT THE GOVERNMENT'S CLAIMS

This Court enjoined the Mandate in this case, in *Wheaton College v. Burwell*, 134 S.Ct. 2806 (2014), and in *LSOP*, 134 S.Ct. 1022 (2014). Although the Court did not opine on the merits, it did grant extraordinary relief under the All Writs Act. Such extraordinary intervention highlights the issue's extraordinary importance and the need for immediate review. Yet, the Government now claims those injunctions show the Mandate "is consistent with RFRA." Opp. 28.

Unlike the Accommodation, this Court's injunctions did not require Petitioners to take actions that violate their religious beliefs. The Government is correct that those injunction orders allow it to "rely" on the plaintiffs' notice "'to facilitate the provision of full contraceptive coverage.'" Opp. 28-29. But that is entirely consistent with Petitioners' argument: an injunction protecting

Petitioners would leave the Government free *independently* to provide contraceptives to Petitioners' plan beneficiaries without any forced, offensive involvement by Petitioners themselves.

The Mandate differs from the injunctions, including because it forces Petitioners to "identify [their] TPAs" and describe their plans to facilitate delivery of the objectionable coverage. Opp. 29. The Government does not even *attempt* to explain why this required information does not substantially burden Petitioners' religious exercise, but instead insists that this is "the minimum information necessary" to "administer the accommodation." Opp. 31. As noted above, however, the Government could provide the objectionable coverage independently of Petitioners' TPAs. *Supra* p.6, 8. If the Government somehow *must* use these TPAs (a baseless proposition), it could identify them through other sources (*i.e.*, HHS posting the accommodated entities online and requiring all insurers and TPAs to check that list).

IV THIS CASE PRESENTS A UNIQUE OPPORTUNITY TO RESOLVE THIS EXCEPTIONALLY IMPORTANT ISSUE

This case involves whether Catholic institutions integral to the mission of two Catholic Dioceses can be forced to violate their undisputed and sincerely-held religious beliefs. This case will affect over 875,000 Catholics, and a ruling will impact thousands of other religious institutions that have filed dozens of suits. Absent this Court's review, thousands of religious organizations will be forced to decide between violating their religious beliefs and paying ruinous fines.

Of all pending petitions, this case presents the most fully-developed factual record. Pet. 14-17, 34-37. Petitioners provided extensive testimony and evidence showing that they believe the "ramifications" of complying with the Accommodation are "eternal." Pet.App.84a. The unimpeached witness testimony, factual stipulations, and documentary evidence establish that Petitioners accurately described the Accommodation and determined that it violates their undisputed, sincerely-held religious beliefs. *E.g.*, Pet.App.83a-85a, 95a-97a. The Government did not contest the sincerity of these beliefs, nor set forth any contrary facts. Pet.App.120a-122a; Pet. 16.[5]

This case also raises whether the Accommodation improperly discriminates among equally religious organizations. For the first time in history, the Government has divided religious organizations into two categories: recognizing that full protection is warranted for the religious beliefs of some organizations it chose to "exempt," while asserting that lesser protection is warranted for the religious beliefs of other organizations it chose to "accommodate." Pet.App.110a-115a; Pet. 6, 15-16, 27. The Government tried before to convince this Court to draw such a distinction that would limit the free exercise of religion to houses of worship. The Court rejected this attempt in *Hosanna Tabor v. EEOC*,

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[5] The Diocese of Pittsburgh sponsors a grandfathered health plan but its claims here stem only from the non-grandfathered plan it sponsors for Catholic Charities. Pet.App.77a-80a. The Diocese's grandfathered plan, not at issue here, presents no vehicle problem. *Cf.* Opp. 34 n.15.

132 S.Ct. 694 (2012). Yet, the Government now improperly seeks to narrow religious freedom through its two-tiered regulation.[6]

CONCLUSION

For these reasons, the petition for certiorari should be granted.

Respectfully submitted,

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[6] The Government claims it is unclear whether Petitioners sponsor ERISA-exempt church plans. Opp. 10. But that point is absent from the parties' factual record, because it is irrelevant. Still, Petitioners will stipulate that they sponsor self-insured church plans, as they stated to the Third Circuit during oral argument. Recording 29:21, http://www2.ca3.uscourts.gov/oralargument/audio/13-3536GenevaCollegeetalv.SecUSDeptofHHSetal.mp3.